

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In re:	)	
	)	
Transaction Network Services, Inc., TSYS	)	CC Docket No. 95-155
Acquiring Solutions, LLC, and Electronic	)	
Payment Systems, LLC	)	
	)	
Regarding FCC Jurisdiction and RespOrg	)	
Responsibilities to Comply with Part 52 of	)	
the FCC's Rules and the SMS/800 Tariff	)	
Requirements	)	

To: Office of the Secretary  
Attn: Chief, Wireline Competition Bureau

**TRANSACTION NETWORK SERVICES, INC.'S RESPONSE**  
**TO TSYS PETITION**

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February 6, 2011

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**TRANSACTION NETWORK SERVICES, INC.'S RESPONSE  
TO TSYS PETITION**

Transaction Network Services, Inc. ("TNS") is an international data communications company headquartered in Reston, Virginia. It provides data communications services to major processors of payment card transactions like TSYS Acquiring Solutions, LLC ("TSYS") by securely transmitting payment transaction data between merchant payment card terminals at the point-of-sale and the processor's network. TNS has a direct interest in this matter as the Responsible Organization<sup>1</sup> chosen and appointed by TSYS for three of the toll-free numbers at

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<sup>1</sup> A Responsible Organization (RespOrg) is "[t]he entity chosen by a toll free subscriber to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber." 47 C.F.R. § 52.101(b). A RespOrg is "[t]he entity that has total responsibility for the account management of a particular toll-free number, including maintaining its customer record in the [toll-free Service Management System]." 800 Service Management System (SMS/800) Functions, Tariff FCC No. 1 ("SMS/800 Tariff"), § 2.7, *available at* <http://www.sms800.com/PublicContent.aspx?Text=Tariff&URL=Shared Documents/Public/SMS^800 Documents/Tariff&Site=Public>.

issue here.<sup>2</sup> The TNS-Administered Numbers currently are used to securely transmit payment transaction data for over 70 million transactions a month between more than one-half million merchant terminals throughout the United States and TSYS' transaction processing network through TNS' network. More particularly, TNS has been drawn into this matter because, on January 10, 2011, Electronic Payment Systems ("EPS") caused TNS to be served with a Writ of Execution issued by the United States District Court for the Eastern District of Virginia that demands TNS to turn over those three toll-free numbers for which it serves as TSYS' RespOrg to EPS by March 15, 2011.

## **I. EXECUTIVE SUMMARY**

TSYS filed a petition ("Petition") with the Commission seeking, among other things, a declaration that "RespOrgs may not, without explicit authority from the FCC, transfer toll free numbers between unaffiliated subscribers."<sup>3</sup> TNS files this response to outline its obligations and restrictions as a RespOrg and to highlight the difficult situation it has been placed in by the actions of EPS, as well as to note the immense harm to the public and innocent third parties that would be caused if EPS were permitted to force a transfer of the TNS-Administered Numbers to itself under the circumstances of this case. TNS urges the Commission to take expedited action in order to prevent a violation of the Commission's regulations and the SMS/800 Tariff, as well as to avoid severe and irreparable harm to TNS, the public, and other third parties not involved in the litigation between EPS and TSYS over these toll-free numbers.

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<sup>2</sup> The toll-free numbers at issue are 800-370-8507, 877-488-0358, and 800-411-6902, which will be referred to hereinafter as the "TNS-Administered Numbers."

<sup>3</sup> *In re Transaction Network Services, Inc., TSYS Acquiring Solutions, LLC, and Electronic Payment Systems, LLC*, CC Docket No. 95-155, at ii (filed Jan. 24, 2011).

## **II. BACKGROUND**

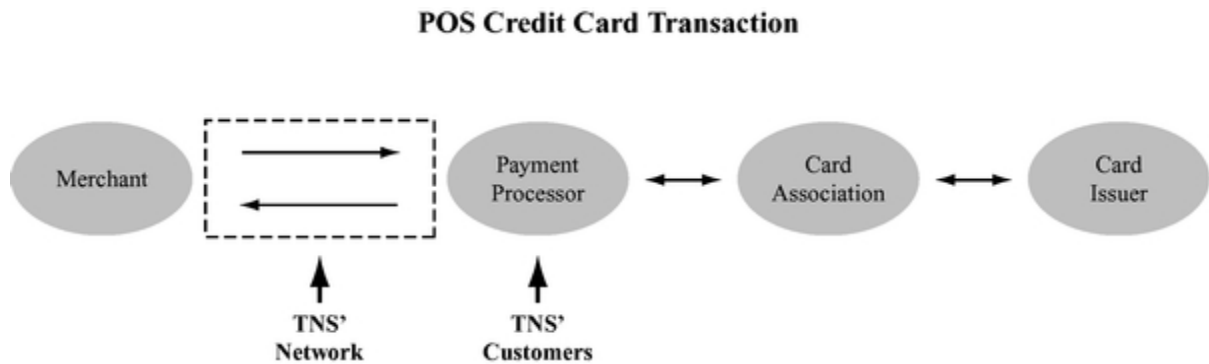
Since 2002 TNS has provided TSYS with data communications services necessary to securely transmit payment transaction data from its merchants' terminals at the point-of-sale to TSYS' host computer for processing of payment card transactions. Over one-half million TSYS merchant terminals at the point-of-sale currently connect to TSYS over TNS' network using toll-free services of interexchange carriers (IXCs) and local exchange carriers (LECs) managed by TNS. The merchant terminals dial a toll-free number that has been assigned to TSYS and that is routed through the toll-free service provider's Service Control Points to TNS' network to establish a connection. The payment card transaction data is then securely transmitted over that dedicated toll-free connection to TNS' network. TNS aggregates the transaction data received from over one-half million TSYS merchant terminals throughout the United States and then securely delivers that data in a consistent format designated by TSYS for purposes of processing those payment card transactions with the appropriate card associations (e.g., Visa and MasterCard) and card issuers (e.g., Bank of America and Capital One).

TNS' network is certified by the Payment Card Industry and complies with the Payment Card Industry Data Security Standards (PCI-DSS) for storing, transmitting, or processing payment card transactions. The PCI-DSS are a detailed set of industry standards developed by the major credit card companies including Visa and MasterCard to ensure that payment card transaction data is transmitted securely between banks, merchants, processors, and other payment card industry institutions in order to protect cardholder data from theft and to combat payment card fraud.<sup>4</sup>

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<sup>4</sup> The PCI DSS can be downloaded from the Document Library at [https://www.pcisecuritystandards.org/security\\_standards/index.php](https://www.pcisecuritystandards.org/security_standards/index.php).

The following chart illustrates the route of a typical payment card transaction from the point-of-sale through TNS' network to TSYS' payment processing network connected to the Payment Card Industry network.



TSYS is the toll-free service subscriber for each of the TNS-Administered numbers. The toll-free services are used to connect TSYS' merchant terminals to the TNS network. For each of the TNS-Administered Numbers, TSYS as the toll-free subscriber has appointed TNS as the RespOrg and authorized TNS to manage and administer the appropriate records and specific subscriber routing information entered into the toll-free Service Management System database and downloaded to the appropriate Service Control Points of the various toll-free service providers. Specifically, TNS has served as the RespOrg for TSYS for the 877-488-0358 number from January 14, 2003 to the present; for the 800-370-8507 number from March 30, 2006 to the present; and for the 800-411-6902 number from November 6, 2007 to the present. As TSYS' RespOrg, TNS has arranged for routing information for each of the TNS-Administered Numbers to be downloaded in the Service Control Points of the appropriate toll-free service providers. Each of the TNS-Administered Numbers currently are in Working Status<sup>5</sup> and being utilized by over one-half million TSYS merchant terminals to complete toll-free calls to establish the

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<sup>5</sup> The term "Working Status" means "[t]he toll free number is loaded in the Service Control Points and is being utilized to complete toll free calls." 47 C.F.R. § 52.101(b).

connection over which payment transaction data is transmitted between the TNS network and the TSYS merchant terminals for processing by TSYS. More than 70 million payment transactions per month are transmitted over the TNS-Administered Numbers.

***The Arbitral Award.*** Since 2005, TSYS has been the primary processor for EPS merchants' payment card transactions.<sup>6</sup> TSYS and EPS have operated under a Processing Services Agreement since that time, but over time they began to have repeated fee disputes.<sup>7</sup> In 2008, the parties submitted their dispute to binding arbitration.<sup>8</sup> In early 2009, the arbitration culminated in an arbitral award in favor of EPS (the "Arbitral Award") that included, among other things, an order for "TSYS to provide EPS with immediate and continuous ownership, control and access to the toll free 1-800 number that connects EPS' merchants to a processor."<sup>9</sup> This order was based upon the arbitrator's conclusion that TSYS had verbally promised to provide EPS with an exclusive toll-free number for EPS merchants to use for payment card processing.<sup>10</sup>

Some time after issuance of the Arbitral Award, it became clear that the arbitrator had been unaware that EPS had been programming a variety of TSYS' toll-free numbers into its merchants' point-of-sale payment card terminals.<sup>11</sup> TSYS in fact has seven toll-free numbers (three of which are the TNS-Administered Numbers) that have been programmed into EPS

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<sup>6</sup> Petition at 3.

<sup>7</sup> Petition at 4.

<sup>8</sup> Petition at 4.

<sup>9</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. CV-09-155-PHX-JAT, slip op. at 2 (filed Jan. 28, 2011) (order granting motion to compel) (quoting the Arbitral Award).

<sup>10</sup> Petition at 4.

<sup>11</sup> Petition at 5.

merchant terminals and now connect EPS merchants to TSYS as its processor.<sup>12</sup> In other words, there is no such thing as “the toll free 1-800 number that connects EPS’ merchants to a processor” —there are seven such numbers. More importantly, EPS merchants make up only a tiny fraction of the merchants—whether measured by number of merchants or number of transactions—that use these numbers to process financial transactions. As indicated in the Petition, in the month of November 2010, 2,450 EPS merchants processed approximately 164,079 transactions over the TNS-Administered Numbers.<sup>13</sup> During that same month, approximately 573,000 non-EPS merchants processed some 70.2 million transactions over the TNS-Administered Numbers.<sup>14</sup> In other words, for that one month, *EPS merchants represented less than one-half of one percent of the merchants utilizing the TNS-Administered Numbers and less than one-quarter of one percent of the transactions processed over the TNS-Administered Numbers.*

***The Arizona Amended Judgment.*** Following the issuance of the Arbitral Award, TSYS and EPS took their dispute to the United States District Court for the District of Arizona, with EPS seeking a judgment enforcing the Arbitral Award and TSYS seeking to have the Arbitral Award vacated. On May 4, 2010, the District of Arizona issued a judgment (“the Arizona Amended Judgment”) confirming the Arbitral Award but without providing any clarity as to how to effectuate the Arbitral Award’s order to transfer “the toll free 1-800 number that connects EPS’ merchants to a processor.”<sup>15</sup> In order to try to enforce the Arizona Amended Judgment and

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<sup>12</sup> Petition at 5.

<sup>13</sup> Petition at 4.

<sup>14</sup> Petition at 4.

<sup>15</sup> Amended Judgment, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. CV-09-155-PHX-JAT, slip op. at ¶ 5 (filed May 4, 2010). TSYS then filed a declaratory judgment action in the District of Arizona seeking clarification of the meaning of the



the Arbitral Award, EPS did two things: (1) on May 27, 2010, it filed a motion to compel enforcement in the District of Arizona (followed later by a supplemental motion to compel on December 3, 2010);<sup>16</sup> and (2) on August 10, 2010, it domesticated the Arizona Judgment in the United States District Court for the Eastern District of Virginia.<sup>17</sup> Thereafter, on December 3, 2010, EPS sent a letter to TNS (the “EPS Demand Letter”) claiming that “EPS owns and controls the [TNS-Administered Numbers]” and demanding TNS to facilitate a change of RespOrgs such that Phoenix Managed Networks LLC would become the new RespOrg for the TNS-Administered Numbers.<sup>18</sup> Consistent with federal law and its obligations and responsibilities as RespOrg, TNS has declined to make such a RespOrg change without specific written authorization from TSYS.

***The Writ of Execution.*** As a further attempt at enforcing the Arizona Amended Judgment and Arbitral Award, on January 10, 2011, EPS served a Writ of Execution upon TNS through the action initiated when EPS domesticated the Arizona Amended Judgment in the Eastern District of Virginia. The Writ of Execution demands that TNS turn over “the goods and chattels, lands and tenements in [its] district belonging to: TSYS Acquiring Solutions, LLC and held by [TNS],” specifically, the “[TNS-Administered Numbers] and all documents necessary to

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Arbitral Award. The court rejected this request for clarification and TSYS is appealing that ruling to the United States Court of Appeals for the Ninth Circuit. Petition at 5-6.

<sup>16</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. CV-09-155-PHX-JAT, slip op. at 6 (filed Jan. 28, 2011).

<sup>17</sup> *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. 1:10-mc-00043-LO (E.D. Va. filed Aug. 10, 2010).

<sup>18</sup> Letter from Anthony S. Maley, Chief Operating Officer, Electronic Payment Systems, to Transaction Network Services and Verizon Communications (Dec. 3, 2010). *See* Exhibit A attached hereto.

provide [EPS] with immediate and continuous ownership control, and access to said numbers” by March 15, 2011.<sup>19</sup>

### **III. A RESPORG MAY NOT TRANSFER CONTROL, MUCH LESS OWNERSHIP, OF A TOLL-FREE NUMBER.**

As a fundamental matter, “no individual or entity is granted a proprietary interest in any toll-free service number,”<sup>20</sup>—not the toll-free subscriber, and certainly not the RespOrg, whose sole duty is “to manage and administer the appropriate records in the toll free Service Management System for the toll free subscriber.”<sup>21</sup> Accordingly, no entity can lawfully transfer ownership of a toll-free number. Thus, to the extent they are interpreted to order the transfer of ownership of the TNS-Administered Numbers, the Arbitral Award and the Arizona Amended Judgment would run afoul of federal law.

Even setting aside this fundamental issue, the Arbitral Award, the Arizona Judgment, and the Writ of Execution would be legally infirm if interpreted to require TNS (as RespOrg) to

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<sup>19</sup> Writ of Execution, *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, No. 1:10-mc-00043-LO, at Schedule A (E.D. Va. Dec. 15, 2010). See Exhibit B attached hereto.

<sup>20</sup> SMS/800 Tariff, § 2.3.1(A)(1); see also *id.* § 2.1.7 (“No individual or entity (e.g., subscriber/assignee, service provider, etc.) shall acquire any interest in, or proprietary right to, any toll-free telephone number assigned to the toll-free subscriber.”); *id.* § 2.3.1(A)(7) (“No individual or entity (e.g., subscriber, service provider) has a proprietary interest in any given toll-free number.”); *Toll Free Service Access Codes*, 13 FCC Rcd 9058, 9061, n.14 (1998); see also *Toll Free Service Access Codes*, 10 FCC Rcd 13692, 13702, ¶ 36 (1995); *Administration of the North American Numbering Plan*, 11 FCC Rcd 2588, 2591, ¶ 4 (1995).

<sup>21</sup> 47 C.F.R. § 52.101(b); see also SMS/800 Tariff § 2.3 (“The Resp Org is the entity identified by the toll-free subscriber or the subscriber's agent that assumes the duty of managing and administering the appropriate records in the SMS/800.”). In particular, “[t]he Resp Org is responsible to its subscribers for the overall coordination to provision, maintain and test toll-free Service between various entities, including Local Exchange Carriers (LECs) and Interexchange Carriers (ICs).” *Id.* § 2.3.1. “Functions provided include data entry, record change and trouble acceptance, referral, and/or clearance.” *Id.* § 2.3. Additionally, RespOrgs are required to, among other things, maintain the security of the SMS/800, see *id.* § 2.5, and safeguard Proprietary Information of toll-free subscriber or issuing carriers, see *id.* § 2.6.

transfer control of the TNS-Administered Numbers to EPS. A RespOrg may not transfer a toll-free number from one subscriber to another subscriber. As noted above, Commission regulations authorize a RespOrg only to manage and administer the appropriate records in the toll-free Service Management System (“SMS/800”). More importantly, the SMS/800 Tariff, which regulates “the provision of [SMS/800] functions and support services for toll free telephone numbers,”<sup>22</sup> expressly prohibits such a transfer.

In particular, the SMS/800 Tariff specifically prohibits “[a]ll entities, (e.g., Resp Orgs, subscribers, service providers), . . . from selling, brokering, bartering, and releasing for a fee (or otherwise) any toll-free number.”<sup>23</sup> In addition, the “System Security” provisions of the SMS/800 Tariff require a RespOrg to prevent security breaches by allowing unauthorized access to or transfer of toll-free numbers.<sup>24</sup> The SMS/800 Tariff further limits the scope of actions a RespOrg may undertake by prohibiting RespOrgs from “perform[ing] any functions using the SMS/800 which are not expressly provided for under this tariff.”<sup>25</sup> And violation of this prohibition may result in termination of the entity’s status as a RespOrg.<sup>26</sup>

Under the circumstances of this case, TNS has therefore been placed in the unreasonable position of either complying with the Commission’s regulations and the SMS/800 Tariff and defying the Writ of Execution, or complying with the Writ of Execution and thereby risking its

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<sup>22</sup> SMS/800 Tariff § 1.1.

<sup>23</sup> *Id.* § 2.3.1(A)(8). In addition, both Commission regulations and the SMS/800 Tariff prohibit warehousing, hoarding, and the sale of toll-free 1-800 numbers. *See* 47 C.F.R. § 52.105, 107; SMS/800 Tariff § 2.2.2.

<sup>24</sup> *See generally id.* § 2.3.5.

<sup>25</sup> *Id.* § 2.2.1.

<sup>26</sup> *Id.* (“Any violation of this paragraph may result in immediate termination of service by the Company.”).

status as a RespOrg by violating the Commission's rules and applicable tariff. Neither option is acceptable, and TNS therefore urges the Commission to act expeditiously and clarify that the FCC rules and applicable tariff do not authorize RespOrgs to transfer toll-free numbers between unaffiliated subscribers.

**IV. SEVERE HARM WILL BEFALL TNS, NON-EPS MERCHANTS, AND THEIR CUSTOMERS IF EPS MANAGES TO FORCE A TRANSFER OF THE TNS-ADMINISTERED NUMBERS TO ITSELF.**

If EPS were able to force a transfer of the TNS-Administered Numbers to itself while those numbers are still being used by over one-half million non-EPS merchants, severe and irreparable harm would be caused not only to TSYS, but also to the millions of others not involved in the contractual dispute litigated between EPS and TSYS. By exercising its exclusive jurisdiction over toll-free numbers, the Commission can prevent the harm that would be caused to TNS, merchants, and consumers from the transfer of the TNS-Administered Numbers. With over one billion transactions per year being handled over the seven toll-free numbers EPS seeks control over, the economic harm and disruption that would be caused is immense and cannot be overstated.<sup>27</sup> TNS and over 750,000 merchants would be harmed, millions of consumers would be denied the ability to purchase goods, and the cardholder data of millions of consumers (whose payment card data is presently transmitted over 750,000 of TSYS' merchant terminals) could be placed in jeopardy of theft or payment card fraud. Under the circumstances, the Commission should take expedited action to prevent this unnecessary harm to innocent third parties by preventing a transfer of the toll-free numbers at issue to EPS.

As the Commission has noted "[i]n the judicial context, it is an 'age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third

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<sup>27</sup> Petition at 3.

parties.”<sup>28</sup> Here, the effects of transferring control of the TNS-Administered numbers to EPS while those numbers are still being used by over one-half million non-EPS merchants would severely and irreparably impact hundreds of thousands of merchants and millions of consumers throughout the United States.<sup>29</sup>

Although EPS has programmed the TNS-Administered Numbers into approximately 2,450 of its merchants’ point-of-sale payment card terminals, none of the TNS-Administered Numbers are exclusive to EPS merchants. Indeed, those same numbers also are used simultaneously by over one-half million of TSYS merchants’ terminals for payment card processing.<sup>30</sup> If EPS acquired just the three TNS-Administered Numbers it has sought to obtain via the Writ of Execution served upon TNS, and caused those numbers to be routed to itself while those numbers are still being used by over one-half million non-EPS merchants, EPS would be receiving over 70 million transactions per month from merchants’ payment card terminals trying to reach TSYS through TNS’ network. However, instead of reaching TSYS through the PCI-DSS certified network of TNS, those transactions and consumer’s cardholder data transmitted therein would be going to EPS (or routed to another entity at EPS’ direction) with no assurance that EPS has the capability to securely process that huge volume of payment card transactions without interruption in service and without a payment card data security breach. Under this scenario, over one-half million merchants and millions of consumers trying to complete payment card transactions over their terminals suddenly could be unable to process credit and debit card transactions. Countless consumers also could be exposed to a heightened

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<sup>28</sup> *DeMoss v. Sprint Communications Company, L.P.*, 23 FCC Rcd 5547 (EB 2008), at ¶ 31 (footnote omitted).

<sup>29</sup> Petition at 3.

<sup>30</sup> Petition at 4.

risk of payment card fraud and theft in violation of the Payment Card Industry Data Security Standards and in violation of federal and state consumer privacy and confidentiality statutes.

As TSYS explains in detail in its Petition, unfortunately there is not a practical way for TSYS to download new toll-free numbers into the over 750,000 non-EPS merchant terminals that are currently using the TNS-Administered numbers.<sup>31</sup> TSYS would have to attempt to individually contact each of those 750,000 merchants and assist them in downloading new numbers into their payment card terminals located throughout the United States, a process that could take years. Compounding this problem, TSYS typically does not have the merchants' contact information to begin this arduous process.<sup>32</sup> As a result, many merchants would only become aware they will have a problem accepting payment card transactions *after* their payment card terminal stops functioning, or *after* its payment card transactions and consumer's cardholder data unknowingly have been exposed to heightened risk of theft and fraud because they were transmitted in a manner not in compliance with the PCI-DSS designed to protect such data.

The severe and irreparable harm that would be caused to TNS, non-EPS merchants, and consumers far outweighs the minimal inconvenience for EPS to merely acquire its own toll-free number for use by its merchants if it deems an exclusive EPS number necessary. EPS is not a payment processor and has no real use for the seven toll-free numbers that it seeks to have transferred from TSYS. EPS merchants presently represent far less than 1% of the call volume on those TSYS numbers. Section 52.107(a)(3) of the Commission's regulations provides: "Routing multiple toll free numbers to a single toll free subscriber will create a rebuttable presumption that the toll free subscriber is hoarding or brokering toll free numbers."<sup>33</sup> Even if

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<sup>31</sup> Petition at 18.

<sup>32</sup> Petition at 18.

<sup>33</sup> 47 C.F.R. § 52.107(a)(3).

EPS actually were equipped to securely process its merchants' payment card transactions directly, its current call volume simply could not justify the transfers it seeks. Accordingly, any interpretation of the Arbitral Award that required transfer of the three TNS-Administered Numbers (and certainly all seven of the numbers at issue) would conflict with the Commission's rules against hoarding toll-free numbers.

## **V. CONCLUSION**

For the foregoing reasons, TNS requests that the Commission act expeditiously and clarify that the FCC rules and applicable tariff do not authorize RespOrgs to transfer toll free numbers between unaffiliated subscribers and to thereby avoid severe and irreparable harm to TNS, non-EPS merchants, and millions of consumers who are innocent third parties to this dispute.

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February 6, 2011

**EXHIBIT A**





12/03/2010

Transaction Network Services Inc.  
11480 Commerce Park Drive  
Suite 600  
Reston, Virginia 20191

Verizon Communications  
RespOrg Reassignment Department  
140 W Street  
New York, NY 10007

**RE: Notice of Intended Change**

Transition Control Supervisor:

EPS owns and controls the following listed numbers. Please provide EPS with any forms, processes, or procedures involved in re-pointing the numbers to a new vendor. Who is our primary point of contact with your organization that would oversee the move? The undersigned (Anthony S. Maley) will be your point of contact with EPS and John "Jack" McDonnell Jr. will be the primary point of contact at Phoenix Managed Networks LLC. I can be reached at the numbers and address noted below and Mr. McDonnell can be reached at (703) 230 - 7600, or 11600 Sunrise Valley Drive, Suite 440, Reston, Virginia 20191.

**TNS**

800-370-8507  
877-488-0358  
800-411-6902

**VERIZON**

800-523-0527  
800-533-4488  
877-488-0467  
877-488-0757

It is the EPS intention to move rapidly on this matter so please provide all necessary resources promptly.

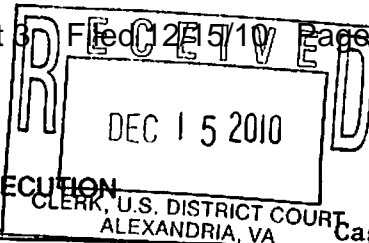
Regards,

A handwritten signature in black ink that reads "Anthony S. Maley". The signature is written in a cursive, flowing style.

Anthony S. Maley  
Chief Operating Officer  
Electronic Payment Systems, LLC  
[amaley@eps-na.com](mailto:amaley@eps-na.com)

c: Mark Pyke, CEO TSYS Acquiring  
TSYS Chief Legal Counsel  
Scotty P. Krob, Esq.  
John McDonnell, Jr.

**EXHIBIT B**



## WRIT OF EXECUTION

CLERK, U.S. DISTRICT COURT  
ALEXANDRIA, VA

Case No. 1:10mc43

United States District Court		DISTRICT Eastern District of Virginia - Alexandria Division	
TO THE MARSHAL OF: Eastern District of Virginia			
YOU ARE HEREBY COMMANDED, that of the goods and chattels, lands and tenements in your district belonging to:			
NAME TSYS Acquiring Solutions, LLC and held by Transaction Network Services, Inc. and set forth in Schedule A attached hereto.			
you cause to be made and levied as well a certain debt of:			
DOLLAR AMOUNT THREE MILLION, (\$3,254,718.92) DOLLARS with post-judgment interest accruing at the applicable federal rate.		DOLLAR AMOUNT SEVEN HUNDRED EIGHTEEN and 92/100 and	
In the United States District Court for the _____ Eastern _____ District of _____ Virginia _____ before the Judge of the said Court by the consideration of the same Judge lately recovered against the said, TSYS Acquiring Solutions, LLC			
and also the costs that may accrue under this writ. And that you have above listed moneys at the place and date listed below; and that you bring this writ with you.			
PLACE United States District Court		DISTRICT Eastern District of Virginia	
CITY Alexandria		DATE March 15, 2011	
Witness the Honorable _____ Liam O'Grady (United States Judge)			
DATE December 15, 2010	CLERK OF COURT Fernando Galindo (BY) DEPUTY CLERK Kathryn M. Szabo /s/		
RETURN			
DATE RECEIVED		DATE OF EXECUTION OF WRIT	
This writ was received and executed.			
U.S. MARSHAL		(BY) DEPUTY MARSHAL	

**SCHEDULE A**

The personal property at issue in this District includes, without limitation, the following general intangibles and/or personal property of TSYS Acquiring Solutions, LLC and its agencies or instrumentalities identified below:

<b><u>Specific Property:</u></b>	Toll-free 1-800 numbers 800-370-8507, 877-488-0358 and 800-411-6902 and all documents necessary to provide Electronic Payment Systems, LLC with immediate and continuous ownership, control, and access to said numbers.
<b><u>Holder of Property:</u></b>	Transaction Network Services, Inc.
<b><u>Location of Property Within District:</u></b>	11480 Commerce Park Drive, Suite 600, Reston, VA 20191

**MOORE & LEE, LLP**

ATTORNEYS AT LAW

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SOUTH FLORIDA OFFICE  
500 East Broward Boulevard, Suite 1820  
Ft. Lauderdale, Florida 33394

December 10, 2010

**VIA HAND DELIVERY**

Clerk of the Court  
U.S. District Court for the Eastern District of Virginia  
Albert V. Bryan U.S. Courthouse  
401 Courthouse Square  
Alexandria, VA 22314

Re: *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*,  
Case No. 1:10-mc-00043

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Dear Sir or Madam:

Electronic Payment Systems, LLC ("EPS"), by counsel, hereby submits the attached Writ of Execution on the property owned by TSYS Acquiring Solutions, LLC ("TSYS"). Schedule A attached to the Writ of Execution sets forth the relevant assets and their location within the Court's jurisdiction. EPS respectfully requests that the Court and the Clerk's office execute the enclosed Writ of Execution.

By way of background, on May 4, 2010, the U.S. District Court for the District of Arizona issued a judgment in favor of EPS and against TSYS, requiring TSYS to, *inter alia*, "provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor." See Court's May 4, 2010 Amended Judgment, attached hereto as Exhibit 1 and Court's May 4, 2010 Order, attached hereto as Exhibit 2. On August 10, 2010, EPS registered this judgment in this Court via *TSYS Acquiring Solutions, LLC v. Electronic Payment Systems, LLC*, Case No. 1:10-mc-00043.

Through this Writ of Execution, EPS now seeks to enforce this judgment against TSYS' property in this jurisdiction. Specifically, EPS seeks to take ownership, control and access of the toll free 1-800 numbers that connect EPS' merchants to a processor, that are the property of TSYS but under the control of Transaction Network Services, Inc. ("TNS"), a company domiciled in this Court's jurisdiction. See Declaration of William B. Smoak attached hereto as Exhibit 3. The three toll-free numbers that EPS' dial-up merchants use to connect to the processor are: 1) 800-370-8507, 2) 877-488-0358 and 3) 800-411-6902. *Id.*

200 DEC 13 P 1:17  
CLERK OF COURT  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA, VA 22314

RECEIVED

Clerk of the Court  
December 10, 2010  
Page 2

Accordingly, EPS respectfully requests that the Court and the Clerk's office execute the enclosed Writ of Execution. A Form USM-285 is also enclosed for service of the Writ of Execution by the U.S. Marshals Service. Please contact the undersigned if the Court or the Clerk's office require any additional information regarding the Writ of Execution.

Very truly yours,

MOORE & LEE, LLP

A handwritten signature in black ink, appearing to read "Kristen A. Bennett", written in a cursive style.

Kristen A. Bennett

Enclosures

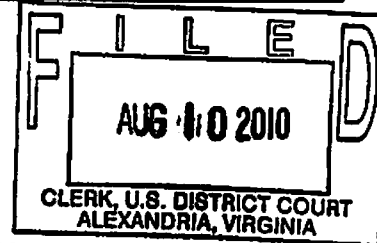
cc: Scott Krob, Esq.

AO 451 (Rev. 01/09) Clerk's Certification of a Judgment to be Registered in Another District

1:10mc43

UNITED STATES DISTRICT COURT

for the  
District of Arizona



TSYS ACQUIRING SOLUTIONS, LLC,

*Plaintiff*

v.

ELECTRONIC PAYMENT SYSTEMS, LLC

*Defendant*

Civil Action No. 2:09-cv-00155JAT

CLERK'S CERTIFICATION OF A JUDGMENT TO BE REGISTERED IN ANOTHER DISTRICT

I certify that the attached judgment is a copy of a judgment entered by this court on (date) 05/04/2010.

I also certify that, as appears from this court's records, no motion listed in Fed. R. App. P. 4(a)(4)(A) is pending before this court and that no appeal has been filed or, if one was filed, that it is no longer pending.

Date:

8/9/10

CLERK OF COURT **RICHARD H. WEARE**

  
Signature of Clerk or Deputy Clerk

EXHIBIT

1

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

TSYS Acquiring Solutions, LLC,	)	<b>AMENDED JUDGMENT<sup>1</sup></b>
	)	
Plaintiff,	)	CV-09-155-PHX-JAT
	)	
v.	)	
	)	
Electronic Payment Systems, LLC,	)	
	)	
Defendant.	)	

---

— Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that pursuant to the Court's Order filed October 22, 2009, granting Defendant's Motion for Summary Judgment, judgment is entered in favor of Defendant and against Plaintiff. The Arbitrator's Findings, Conclusions and Award dated January 20, 2009, in American Arbitration Association Case No. 76-Y-000038-07, is hereby confirmed, awarding the following amounts and relief to Defendant Electronic Payment Systems, LLC, and against Plaintiff TSYS Acquiring Solutions, LLC:

1. Refunds of amounts over-billed by TSYS and paid by EPS
  - a. Transaction fees  
\$24,465.16
  - b. Help Desk Services  
\$32,436.20
  - c. Monthly Merchant Statement file fees  
\$42,884.75  
\$32,062.91  
\$4,767.00

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<sup>1</sup>Amended pursuant to the Court's Order filed May 4, 2010.



2. Reimbursement of fines and charges paid by EPS
  - a. VMPD  
\$131,875.00
  - b. Papa Gyros Interchange  
\$17,607.74
3. \$2,671,463.57 for damages to EPS for its counter-claims in connection with the Billing Element Tables.
4. TSYS shall handle all future calls from EPS merchants as specified in the arbitrator's award and TSYS shall modify the charges on all invoices as reflected in the arbitrator's award.
5. TSYS shall provide EPS with immediate and continuous ownership, control, and access to the toll free 1-800 number that connects EPS' merchants to a processor.
6. \$27,241.49, representing the costs incurred by EPS in connection with the arbitration.
7. The administrative fees and expenses of the American Arbitration Association totaling \$16,750.00 shall be borne entirely by TSYS. Therefore, TSYS shall reimburse EPS the additional sum of Thirty Eight Thousand Six Hundred Fifty Dollars and No Cents (\$38,650.00) representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by EPS, upon demonstration that these incurred costs have been paid.
8. The arbitrator found that TSYS failed to establish that it is entitled to be paid the fees billed for the XML Statement file in the amount of \$2,250 per month. From April 2006 through June 2008, such charges amount to \$60,750. Consistent with the arbitrator's ruling, TSYS shall not charge EPS for the XML Statement file from June 2006 forward.
9. Based on the calculations set forth on Exhibit R-31 before the arbitrator, the arbitrator found and concluded that TSYS over-billed EPS for the CDs between December 2006 and June 2008 in the amount of \$30,595.10 and sustained EPS' dispute in that same amount.

**PRINCIPAL AMOUNT AWARDED: \$3,114,798.92**

**Attorneys' fees: \$139,920.**

**TOTAL AMOUNT AWARDED THROUGH DATE OF JUDGMENT, OCTOBER 22, 2009: \$3,254,718.92**

**Interest: post-judgment interest shall accrue at the applicable federal rate.**

Plaintiff to take nothing, and complaint and action are dismissed.

May 4, 2010

RICHARD H. WEARE  
District Court Executive/Clerk

s/L Dixon  
By: Deputy Clerk

cc: (all counsel)

I hereby attest and certify on 8/9/10  
that the foregoing document is a full, true and correct  
copy of the original on file in my office and in my cus-  
tody.

CLERK, U.S. DISTRICT COURT  
DISTRICT OF ARIZONA

by [Signature] Deputy

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 TSYS Acquiring Solutions, LLC,

10 Plaintiff,

11 vs.

12 Electronic Payment Systems, LLC,

13 Defendant.  
14  
15

No. CV 09-0155-PHX-JAT

**ORDER**

16 Pending before the Court are Defendant Electronic Payment Systems, LLC's Motion  
17 for Attorneys' Fees and Related Non-Taxable Expenses (Doc. # 35); Defendant's Motion to  
18 Amend Judgment (Doc. # 39); Plaintiff TSYS Acquiring Solution, LLC's Combined Motion  
19 to Amend or Vacate Judgment Under Rules 59(e) and 60(b) and Motion for Leave to File a  
20 Supplemental Pleading Under Rule 15(d) (Doc. # 40); Defendant's Amended Motion to  
21 Amend Judgment (Doc. # 44); and Plaintiff's Motion to Strike Document Numbers 42 and  
22 44 (Doc. # 46). The Court now rules on the motions.

23 **I. Background**

24 On October 22, 2009, the Court entered summary judgment in favor of Defendant.<sup>1</sup>  
25 That same day, the Clerk of the Court entered judgment according to this Court's direction.  
26 Concerned that the judgment entered did not contain any reference to the arbitration award,  
27

28 <sup>1</sup> For a recitation of the pertinent facts, see Doc. # 33.

**EXHIBIT**

**2**

1 nor specific language pertaining to the dollar amounts contained in the arbitration award,  
2 Defendant sought to amend the judgment entered. Defendant also applied for a writ of  
3 garnishment, which was denied due to a lack of specificity in the judgment.

4 **II. Defendant's Motion for Attorneys' Fees**

5 Defendant moves for its attorneys' fees and related non-taxable expenses incurred in  
6 connection with the vacatur proceedings in this Court. In response, Plaintiff argues that the  
7 parties agreement does not provide a basis for Defendant to recover attorneys fees. The  
8 Court disagrees.<sup>2</sup>

9 Section 7.1 of the parties' agreement contains the following provision:

10 [TSYS] Indemnification. [TSYS] shall be liable to and shall indemnify and  
11 hold EPS from and against any and all loss, liability, cost, damage and  
12 expense, including litigation expenses and reasonable attorneys' fees and  
13 allocated costs for in-house legal services, to which EPS may be subjected or  
14 which it may incur in connection with any claims which arise from or out of  
or as a result of the negligen[t] acts or omissions of [TSYS], its officers,  
employees, agents and affiliates in the performance of their duties and  
obligations under this Agreement.

15 (Doc. # 1-1, p. 22, at ¶ 7.1.) Plaintiff argues that this provision is simply a promise to  
16 indemnify Defendant from any third-party claims against Defendant. However, the plain  
17 language of Section 7.1 is not so limiting. Section 7.1 states that Plaintiff shall be liable to  
18 Defendant for *all* litigation expenses and attorneys' fees Defendant incurs as a result of the  
19 negligent acts of Plaintiff, and not just those of third-party claims. *See* BLACK'S LAW  
20 DICTIONARY (8th ed. 2004) (defining "indemnify" as: "To reimburse (another) for a loss  
21 suffered because of a third party's or one's own act or default."). The arbitrator specifically  
22 found that Plaintiff was negligent in mapping over the information referred to as billing  
23 element tables ("BET"). *See* Doc. # 42-1, pp. 34-35 ("Furthermore, the Arbitrator notes that  
24 interpreting Section 7.6 to excuse TSYS's negligence in transferring the BETs would be  
25

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26 <sup>2</sup> The Court denies Defendant's other two asserted basis for attorneys' fees, as the  
27 Court does not believe Plaintiff's action has been frivolous, without merit, brought for an  
28 improper purpose, or for any other basis subjecting it to 28 U.S.C. § 1927 or Rule 11  
sanctions.

1 directly contrary to the indemnification provisions of Section 7.1 which expressly make  
2 TSYS liable to EPS for any negligent acts or omissions by TSYS. . . . TSYS cannot be heard  
3 to complain about their own failure to act. . . . Accordingly, the Arbitrator finds that TSYS  
4 breached its agreement to accurately map over the BET's and that such breach proximately  
5 caused EPS damages between April 2006 and June 2007 in the amount of \$2,671,463.57, for  
6 which EPS is entitled to be compensated.""). Because the only aspect of the award Plaintiff  
7 sought vacatur of in this Court was the BET breach of contract claim, and because the  
8 arbitrator found that the BET claim arose because of Plaintiff's negligent acts and omissions,  
9 per Section 7.1 of the parties' agreement, Defendant is entitled to its attorneys' fees. The  
10 Court will next consider the reasonableness of Defendant's claimed attorneys' fees.

11 Defendants attached to its memorandum in support of attorneys' fees detailed billing  
12 summaries as well as affidavits in support of its request for attorneys' fees. Defendants'  
13 attorney, Mr. Krob, charges \$225 per hour, while Defendant's local counsel, Mr. McCoy,  
14 charges \$195 per hour. Mr. Krob has practiced law for nearly thirty years, and has  
15 experience as a former judge. Mr. McCoy has more than eight years experience as an  
16 attorney. Plaintiffs do not object to the hourly rates charged by Mr. Krob and Mr. McCoy.  
17 These rates are similar, if not below, those charged by other Phoenix attorneys with the same  
18 amount of experience. Therefore, the Court finds that the hourly rates charged by  
19 Defendants' attorneys are reasonable.

20 Plaintiff argues that Defendant's time records do not comply with LRCiv 54.2.  
21 Specifically, Plaintiff asserts that certain of Defendant's attorneys' time entries are  
22 unreasonable and excessive in nature, as they bill for more than twenty-four hours in a single  
23 day. Moreover, Plaintiff argues, Defendant fails to identify the person performing the  
24 service. In reply, Defendant identifies each person by name; and, with respect to the greater  
25 than twenty-four hours issue, Defendant states that its billing program enters the entire  
26 month's billing for law clerks on the last day of the month. Hence, the possibility of a  
27 greater than twenty-four hour entry. The Court finds Defendant's proffered explanations  
28 reasonable. Additionally, Defendant addressed each of Plaintiff's objections to Defendant's

1 itemized billing statement. The Court has reviewed Defendant's responses to Plaintiff's  
2 objections, and finds that Defendant has satisfied LRCiv. 54.2.

3 Plaintiff also argues that under LRCiv. 54.2, travel time cannot be charged, and yet  
4 Defendant includes an entry for a March 30, 2009, travel. In reply, Defendant omits this  
5 charge from its request for attorneys' fees.

6 Plaintiff next argues that Defendant failed to provide a fee agreement for Mr. Krob,  
7 and the retention agreement for Mr. McCoy. In reply, Defendant avers that there is no  
8 written agreement between itself and Mr. Krob. Defendant does, however, attach as an  
9 exhibit a declaration explaining his hourly rates, as well as those of his employees.  
10 Defendant also included a copy of the retention agreement between Defendant and Mr.  
11 McCoy. The Court finds that Defendant has complied with LRCiv. 54.2 and has provided  
12 the Court with sufficient documentation concerning its fee agreements.

13 The Court has reviewed the factors contained in LRCiv. 54.2(c)(3) concerning the  
14 reasonableness of Defendant's requested award. In particular, the court finds LRCiv.  
15 54.2(c)(3)(A),(B),(C),(E),(H),(I), and (K) supportive of Defendant's requested award.  
16 Additionally, the Court has considered the number of hours reasonably expended by Mr.  
17 Krob and Mr. McCoy, and the propriety of the hourly rate requested by each; whether Mr.  
18 Krob and Mr. McCoy have made a good faith effort to exclude hours that are excessive,  
19 redundant, or otherwise unnecessary; and the level of success obtained through Mr. Krob's  
20 and Mr. McCoy's efforts. The Court finds that Defendant's requested award of \$139,920 to  
21 be reasonable and supported by the above factors.<sup>3</sup>

### 22 **III. Defendant's Motions to Amend Judgment and Plaintiff's Motion to Strike**

#### 23 *A. Defendant's Motion to Amend at Doc. # 39*

24 On October 22, 2009, the Court entered an Order resolving the cross-motions for  
25 summary judgment in favor of Defendant. That same day, the Clerk of the Court entered the

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26  
27 <sup>3</sup> Defendant intimates that it will move for attorneys fees incurred in pursuing its  
28 attorneys' fees motion. Defendant shall file a new motion in compliance with the local rules  
requesting such attorneys' fees.

1 following judgment: "IT IS ORDERED AND ADJUDGED that pursuant to the Court's order  
2 filed October 22, 2009, granting Defendant's Motion for Summary Judgment, judgment is  
3 entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and complaint  
4 and action are dismissed." (Doc. # 34.) The Court affirmed the arbitration award in full, yet  
5 nevertheless the Court did not mention a specific dollar figure in directing the Clerk of the  
6 Court to enter judgment, nor did the Court direct the Clerk of the Court to specifically  
7 identify the arbitration award in the judgment.

8 On November 5, 2009, Defendant moved pursuant to Rule 59(e) to have the judgment  
9 amended so as to provide clarity to the parties. Plaintiff did not substantively oppose the  
10 need to amend the judgment.<sup>4</sup> The Court agrees that, for the purpose of providing clarity, the  
11 October 22, 2009, judgment should be amended. As such, the Court has included the proper  
12 language at the end of this Order.<sup>5</sup>

13 *B. Plaintiff's Motion to Strike*

14 On November 12, 2009, at Doc. # 42, Defendant filed an amendment to its proposed  
15 form of judgment. After an administrative notice concerning the deficiency of Defendant's  
16 filing at Doc. # 42, Defendant filed at Doc. # 44 the same amended proposed form of  
17 judgment, only in the form of an amended motion to amend the judgment. Plaintiff now  
18 seeks to strike the documents contained at Doc. #'s 42 and 44 pursuant to LRCiv. 7.2(m)(1)  
19

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20 <sup>4</sup> Plaintiff states that it does not oppose Defendant's request to amend the judgment  
21 at Doc. # 39 if the Court grants Plaintiff's requested relief at Doc. # 40. The Court does not  
22 condone Plaintiff's puerile notion that it is acceptable to agree to relief that is needed for  
23 purposes of clarity only if Plaintiff obtains its unrelated, requested relief. Either Defendant's  
24 requested relief at Doc. # 39 has a valid legal basis or it does not; Plaintiff proposes no  
25 substantive basis for opposing Defendant's requested relief at Doc. # 39. As such, it is  
unclear why Plaintiff would suddenly oppose Defendant's motion at Doc. # 39 should the  
Court deny Plaintiff's requested relief at Doc. # 40. Plaintiff's counsel is reminded of that  
wisdom of old: "Simply let your 'Yes' be 'Yes,' and your 'No,' 'No.'"

26 <sup>5</sup> The Court expressly notes that the amended judgment works no substantive changes  
27 to the Court's October 22, 2009, Order. Rather, the judgment is amended only for the  
28 purpose of more clearly expressing the intentions of the Court in its October 22 Order;  
namely, to fully affirm the arbitrator's award, including the monetary award.

1 on the basis that Defendant was not authorized under any statute, rule, or court order to file  
2 these documents.

3 LRCiv. 7.2(m)(1) provides that “a motion to strike may be filed . . . if it seeks to strike  
4 any part of a filing or submission on the ground that it is prohibited (or not authorized) by  
5 a statute, rule, or court order.” Defendant filed its initial Rule 59(e) motion on November  
6 5, 2009, within the 10 day time limit for the filing of such motions. Defendant filed the  
7 documents contained at Doc. # 42 on November 12, 2009, and the documents contained at  
8 Doc. # 44 on November 18, 2009. The Court is not aware of a provision in the Federal Rules  
9 of Civil Procedure permitting the filing of an amended Rule 59(e) motion, nor does  
10 Defendant so suggest. Likewise, the Court is not aware of a basis that would permit  
11 Defendant the ability to amend its Rule 59(e) motion after the 10 day time limit has passed.  
12 *See Harman v. Harper*, 7 F.3d 1455, 1458 (9th Cir. 1993) (stating that district courts are  
13 without power to extend the time for filing a Rule 59(e) motion). Accordingly, the Court  
14 must conclude that Defendant’s filings at Doc. # 42 and 44 are untimely and, as such, the  
15 Court strikes the documents contained at Doc. # 42 and 44.

16 *C. Pre-Judgment Interest*

17 In Defendant’s original motion to amend the judgment at Doc. # 39, Defendant made  
18 no reference to a request for interest in either its motion or in its proposed form of judgment.  
19 In Defendant’s amended proposed form of judgment contained at Doc. #’s 42 and 44,  
20 Defendant has a section devoted to interest. Because the Court has already stricken Doc. #’s  
21 42 and 44, and because Defendant did not include a request for interest in its original motion  
22 to amend the judgment at Doc. # 39, the Court finds that these deficiencies are fatal for  
23 Defendant’s request for pre-judgment interest.

24 Interest that accumulates from the time an arbitration award is issued until the time  
25 a judgment from the district court affirming the arbitration award is entered is considered  
26 pre-judgment interest. *See Northrop Corp. v. Triad Int’l Mktg., S.A.*, 842 F.2d 1154, 1155-56  
27 (9th Cir. 1988) (distinguishing in arbitration context between pre-judgment interest and post-  
28 judgment interest, and holding that “the effective date of judgment for the purpose of



1 calculating interest is the date of the district court's order"). A request for pre-judgment  
2 interest must be raised in a Rule 59(e) motion. *Osterneck v. Ernst & Whinney*, 489 U.S. 169,  
3 175-76, 176 n. 3 (1989); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1130-34  
4 (9th Cir. 2004) (applying the rule pronounced in *Osterneck* concerning Rule 59(e) and a post-  
5 judgment motion for pre-judgment interest). In this case, Defendant did not include a request  
6 for, much less a reference to, pre-judgment interest in its Rule 59(e) motion at Doc. # 39. As  
7 such, the Court is precluded from awarding pre-judgment interest on the arbitration award.

8 *D. Post-Judgment Interest*

9 Defendant argues that "[t]here is no need to distinguish between post-arbitration, pre-  
10 confirmation interest and post-confirmation interest," as the Arizona statutory rate, and not  
11 the federal statutory rate, applies even in the context of post-judgment interest. (Doc. # 54  
12 at p. 5.) Ninth Circuit case law requires otherwise.

13 In *Northrop*, the Ninth Circuit, in a case involving the confirmation of an arbitration  
14 award, held that while pre-judgment interest is to be calculated according to the applicable  
15 state-law rate, post-judgment interest is to be calculated according to federal law. 842 F.2d  
16 at 1155-56. Specifically, post-judgment interest is calculated according to the method  
17 mandated by Congress in 28 U.S.C. § 1961. As such, the Court will award post-judgment  
18 interest according to Section 1961, and not the Arizona statutory rate.<sup>6</sup>

19 **IV. Plaintiff's Rule 59(e), 60(b), and 15(d) Motions**

20 Plaintiff seeks leave to supplement its complaint under Rule 15(d) either pursuant to  
21 a Rule 59(e) motion or a Rule 60(b) motion. The basis for Plaintiff's motions is item five in  
22 the arbitrator's award: "The Arbitrator orders TSYS to provide EPS with immediate and  
23 continuous ownership, control, and access to the toll free 1-800 number that connects EPS'  
24 merchants to a processor." (Doc. # 1-2 at p. 40.) Plaintiff asserts that the parties have  
25

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26 <sup>6</sup> Plaintiff repeatedly asserts in its reply that the post-judgment interest rate issue is  
27 moot because there is no money judgment in this case. The Court disagrees. While there is  
28 not a specific dollar figure in the Clerk of the Court's judgment, nor in the Court's October  
22 Order, the Court fully affirmed the arbitrator's decision, including the monetary award.

1 fundamentally different interpretations of the 1-800 number issue. Plaintiff believes it can  
2 fulfill its obligation under the award by providing Defendant with a new 1-800 number.  
3 Defendant disagrees, stating that the award requires Plaintiff to give Defendant control over  
4 the 1-800 numbers that Defendant's clients are currently using.

5 Plaintiff concedes in its motion that once a judgment has been entered, the filing of  
6 an amended complaint or a supplemental complaint is not permitted unless the judgment is  
7 set aside or vacated under Rules 59 or 60. Hence, the Court will first consider the propriety  
8 of granting Rule 59 or 60 relief.

9 *A. Rule 59(e)*

10 District courts have considerable discretion when considering a motion to amend a  
11 judgment under Rule 59(e). There are four basis upon which this Court can grant a Rule  
12 59(e) motion: "1) the motion is necessary to correct manifest errors of law or fact upon which  
13 the judgment is based; 2) the moving party presents newly discovered or previously  
14 unavailable evidence; 3) the motion is necessary to prevent manifest injustice; or 4) there is  
15 an intervening change in controlling law." *Turner v. Burlington N. Santa Fe R.R. Co.*, 338  
16 F.3d 1058, 1063 (9th Cir. 2003) (italics and quotations omitted). Plaintiff asserts that it is  
17 entitled to Rule 59(e) relief because of newly discovered evidence, and because such relief  
18 is necessary to prevent manifest injustice.

19 1. NEWLY DISCOVERED EVIDENCE

20 Plaintiff asserts that the newly discovered evidence—namely, the disagreement  
21 between the parties concerning the meaning of the award of the 1-800 number—did not come  
22 to light until October 2009. The Court disagrees. The arbitrator issued his award in January  
23 2009. It is clear from the face of the award what the arbitrator ordered: that Plaintiff turn  
24 over control of the numbers that connect Defendant's customers to a processor. Plaintiff  
25 focuses on the word *the*, but misses the thrust of the arbitrator's finding and conclusion;  
26 namely, that Defendant is to be awarded control over its merchants in the event Defendant  
27 decides not to retain Plaintiff's services. It was not the goal of the arbitrator, as mentioned  
28 throughout his award, to award Defendant a single telephone number; rather, Defendant was

1 seeking ownership and control of the numbers its merchants use. Defendant articulated this  
2 same understanding as early as February 2009 in a letter from Mr. Maley.

3 Plaintiff may disagree with the award issued by the arbitrator, but attaching a new  
4 interpretation to the award hardly constitutes new evidence within the meaning of a Rule  
5 59(e) motion. At most, the parties have discovered a new disagreement, but not new  
6 evidence within the meaning of a Rule 59(e) motion. Moreover, the Court fails to see why  
7 this issue was not raised with Plaintiff's original filing in January 2009; or at the very least,  
8 upon receiving Defendant's February 2009 letter. The Court finds that Plaintiff failed to  
9 present newly discovered or previously unavailable evidence such that Rule 59(e) relief is  
10 appropriate.

11 2. MANIFEST INJUSTICE

12 Plaintiff argues that not granting it leave to file a supplemental complaint would work  
13 a manifest injustice, as the three numbers that Defendant's merchants use to connect to a  
14 processor are also used by other merchants besides Defendant's customers. Hence, Plaintiff  
15 asserts, by turning control of these three numbers over to Defendant, Plaintiff would incur  
16 substantial costs, be subjected to potential breach of contract claims, and the risk of potential  
17 security threats would arise. Again, it is not clear why these arguments and evidence in  
18 support were not raised both before the arbitrator and in Plaintiff's initial complaint to this  
19 Court. In essence, Plaintiff asks the Court to reconsider and re-weigh—should the Court allow  
20 a Rule 15 amendment—the consequences of the arbitrator's award concerning the 1-800  
21 number issue. “Rule 59(e) permits a court to alter or amend a judgment, but it ‘may not be  
22 used to relitigate old matters, or to raise arguments or present evidence that could have been  
23 raised prior to the entry of judgment.’” *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2617  
24 n.5 (2008) (quoting 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §  
25 2810.1, pp. 127-28 (2d ed.1995)). Even if Plaintiff is subjected to substantial costs, breach  
26 of contract claims, and potential security threats as it asserts, such results are the natural  
27 consequences of the arbitrator's award. In the arbitration context, the Court cannot grant the  
28 type of relief Plaintiff is ultimately seeking merely because the award will work a hardship

1 for Plaintiff. Plaintiff's complaints resulting from the arbitration award do not constitute  
2 manifest injustice within the meaning of Rule 59(e).<sup>7</sup>

3 Because Plaintiff has failed to show manifest injustice or present newly discovered  
4 evidence, Plaintiff's request for Rule 59(e) relief is denied.

5 *B. Rule 60(b)*

6 Plaintiff also seeks relief under Rule 60(b)(6). Rule 60(b)(6) provides that relief from  
7 a final judgment may be granted for any reason "that justifies relief" other than those listed  
8 under Rule 60(b)(1)-(5). Rule 60(b)(6) is thus a catch-all provision that "has been used  
9 sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only  
10 where extraordinary circumstances prevented a party from taking timely action to prevent  
11 or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d  
12 1047, 1049 (9th Cir. 1993). To prevail under Rule 60(b)(6), the moving party "must  
13 demonstrate both injury and circumstances beyond his control that prevented him from  
14 proceeding with the prosecution or defense of the action in a proper fashion." *Cnty. Dental*  
15 *Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002)).

16 As discussed earlier, Plaintiff has failed to demonstrate why the 1-800 issue was not  
17 raised either before the arbitrator or in Plaintiff's initial filing in this Court. Both the  
18 testimony before the arbitrator and the award itself make clear that the 1-800 issue was fully  
19 litigated at the time of arbitration. Plaintiff has failed to demonstrate that its injuries are  
20 beyond its control such that it was precluded from raising these issues prior to the present  
21 motion. Moreover, as discussed earlier, the Court does not believe that manifest injustice  
22 will result should the Court not permit Plaintiff the ability to supplement its complaint. The  
23 Court denies Plaintiff's requested Rule 60(b)(6) relief.

---

24  
25  
26  
27 <sup>7</sup> At oral argument, the prospect of Plaintiff filing a new and separate declaratory  
28 judgment action concerning the 1-800 issue was raised. The Court makes no comment  
concerning the propriety of such a course of action.

1 Therefore, because the Court has denied Plaintiff's request to amend the judgment  
2 under either Rule 59(e) or 60(b)(6), the Court denies Plaintiff's request to supplement its  
3 complaint.

4 **V. Conclusion**

5 The Court grants Defendant's request for an award of attorneys fees in the amount of  
6 \$139,920. The Court also grants Defendant's motion at Doc. # 39 to amend the judgment.  
7 The Court grants Plaintiff's motion to strike Doc. #'s 42 and 44 on the ground that they are  
8 untimely. The Court further denies Defendant's request for pre-judgment interest. Finally,  
9 the Court denies Plaintiff's request to amend the judgment and file a supplemental pleading.

10 Accordingly,

11 **IT IS ORDERED** that Defendant Electronic Payment Systems, LLC's Motion for  
12 Attorneys' Fees and Related Non-Taxable Expenses (Doc. # 35) is granted.

13 **IT IS FURTHER ORDERED** that Defendant's Motion to Amend Judgment (Doc.  
14 # 39) is granted to the extent discussed above.

15 **IT IS FURTHER ORDERED** that Plaintiff TSYS Acquiring Solution, LLC's  
16 Combined Motion to Amend or Vacate Judgment Under Rules 59(e) and 60(b) and Motion  
17 for Leave to File a Supplemental Pleading Under Rule 15(d) (Doc. # 40) is denied.

18 **IT IS FURTHER ORDERED** that Defendant's Motion for Judgment (Doc. # 42)  
19 and Defendant's Amended Motion to Amend Judgment (Doc. # 44) are both stricken.

20 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Strike Document Numbers  
21 42 and 44 (Doc. # 46) is granted to the extent it is premised upon untimeliness.

22 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter an amended  
23 final judgment as follows:

24 **IT IS ORDERED AND ADJUDGED** that pursuant to the Court's Order filed  
25 October 22, 2009 (Doc. # 33), granting Defendant's Motion for Summary Judgment,  
26 judgment is entered in favor of Defendant and against Plaintiff. The Arbitrator's Findings,  
27 Conclusions and Award dated January 20, 2009, in American Arbitration Association Case  
28 No. 76-Y-000038-07, is hereby confirmed, awarding the following amounts and relief to

1 Defendant Electronic Payment Systems, LLC, and against Plaintiff TSYS Acquiring  
2 Solutions, LLC:

3 1. Refunds of amounts over-billed by TSYS and paid by EPS

4 a. Transaction fees

5 \$24,465.16

6 b. Help Desk Services

7 \$32,436.20

8 c. Monthly Merchant Statement file fees

9 \$42,884.75

10 \$32,062.91

11 \$4,767.00

12 2. Reimbursement of fines and charges paid by EPS

13 a. VMPD

14 \$131,875.00

15 b. Papa Gyros Interchange

16 \$17,607.74

17 3. \$2,671,463.57 for damages to EPS for its counter-claims in connection with the  
18 Billing Element Tables.

19 4. TSYS shall handle all future calls from EPS merchants as specified in the arbitrator's  
20 award and TSYS shall modify the charges on all invoices as reflected in the  
21 arbitrator's award.

22 5. TSYS shall provide EPS with immediate and continuous ownership, control, and  
23 access to the toll free 1-800 number that connects EPS' merchants to a processor.

24 6. \$27,241.49, representing the costs incurred by EPS in connection with the arbitration.

25 7. The administrative fees and expenses of the American Arbitration Association  
26 totaling \$16,750.00 shall be borne entirely by TSYS. Therefore, TSYS shall  
27 reimburse EPS the additional sum of Thirty Eight Thousand Six Hundred Fifty  
28 Dollars and No Cents (\$38,650.00) representing that portion of said fees and expenses

1 in excess of the apportioned costs previously incurred by EPS, upon demonstration  
2 that these incurred costs have been paid.

3 8. The arbitrator found that TSYS failed to establish that it is entitled to be paid the fees  
4 billed for the XML Statement file in the amount of \$2,250 per month. From April  
5 2006 through June 2008, such charges amount to \$60,750. Consistent with the  
6 arbitrator's ruling, TSYS shall not charge EPS for the XML Statement file from June  
7 2006 forward.

8 9. Based on the calculations set forth on Exhibit R-31 before the arbitrator, the arbitrator  
9 found and concluded that TSYS over-billed EPS for the CDs between December 2006  
10 and June 2008 in the amount of \$30,595.10 and sustained EPS' dispute in that same  
11 amount.

12 **PRINCIPAL AMOUNT AWARDED: \$3,114,798.92**

13 **Attorneys fees: \$139,920.**

14 **TOTAL AMOUNT AWARDED THROUGH DATE OF JUDGMENT, OCTOBER 22,**  
15 **2009: \$3,254,718.92**

16 **Interest:** post-judgment interest shall accrue at the applicable federal rate.

17 Plaintiff to take nothing, and complaint and action are dismissed.

18 DATED this 4<sup>th</sup> day of May, 2010.

19  
20  
21   
22 **James A. Teilborg**  
23 **United States District Judge**  
24  
25  
26  
27  
28

**DECLARATION OF WILLIAM B. SMOAK**

1  
2  
3 1. I am an Associate Director of IT Operations for Total Systems Services,  
4 Inc., the parent company to TSYS Acquiring Solutions, LLC (collectively referred to as  
5 "TSYS"). I make this declaration based on my personal knowledge of the facts stated  
6 herein.

7 2. My office is located at 8 Corporate Ridge Parkway, Columbus, GA, 31907.  
8 My phone number is 706-644-7668.

9 3. In February 2010, I was relocated to the Columbus, Georgia location. Prior  
10 to that time, I was employed as an Associate Director of Transaction Delivery at TSYS'  
11 Tempe, Arizona location.

12 4. I have been employed by TSYS for over 12 years. I am authorized to  
13 provide the information contained herein as a representative of TSYS.

14 5. I am aware that EPS is seeking information regarding the toll-free telephone  
15 numbers that its dial-up merchants use to connect to the processor.

16 6. In my capacity as an Associate Director of IT Operations, I am familiar with  
17 the technical aspects of the transaction processing services that TSYS provides to its  
18 clients, including transaction delivery, the toll-free numbers that dial-up merchants use to  
19 connect to the processor and providers of those numbers.

20 7. EPS' dial-up merchants use three toll-free telephone numbers to connect to  
21 the processor.

22 8. The three toll-free numbers that EPS' dial-up merchants use to connect to  
23 the processor are:

- 24 a. 800-370-8507  
25 b. 877-488-0358  
26 c. 800-411-6902  
27  
28

**EXHIBIT**

**3**



**LAW OFFICES**  
One Arizona Center, 400 E. Van Buren  
Phoenix, Arizona 85004-2202  
(602) 382-6000

Digitally signed by Bryan Smoak  
DN: cn=Bryan Smoak, ou=North America, Tempe, US, org=TSYS  
Bidg 8312, email=BSmoak@tsys.com, dc=not, ts, tsys  
Reason: I attest to the accuracy and integrity of this document  
Location: TSYS - EDC, Columbus, GA  
Date: 2010.08.11 14:25:56 -0400

Walt R.

**CERTIFICATE OF SERVICE**

I, Michael R. McCarthy, hereby certify that on this 6<sup>th</sup> day of February 2011, a copy of Transaction Network Services, Inc.'s Response to TSYS Petition was served via US Mail on the following:

Scott R. Flick  
Glenn S. Richards  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, N.W  
Washington, D.C. 20037  
(202) 663-8000  
*Counsel to TSYS Acquiring Solutions, LLC*

Scotty P. Krob  
Attorney at Law  
8400 E. Prentice Avenue, Penthouse  
Greenwood Village, CO 80111  
*Counsel to Electronic Payment Systems, LLC*

/s/ Michael R. McCarthy